Supreme Court, U.S.
FILED
MAR 27 1992
OFFICE OF THE CLERK

(2)

No. 91-1488

In The

Supreme Court of the United States

October Term, 1991

JEFFREY G. RUSS AND SHANNON G. RUSS,

Petitioners,

vs.

INTERNATIONAL PAPER COMPANY,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF INTERNATIONAL PAPER COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

RICHARD D. UNDERWOOD
VARNER, PARKER, SESSUMS, & AKIN
1110 Jackson Street
P.O. Box 1237
Vicksburg, MS 39180
(601) 638-8741

R.E. PARKER, JR.
VARNER, PARKER SESSUMS & AKIN
1110 Jackson Street
P.O. Box 1237
Vicksburg, MS 39180
(601) 638-8741

Lead Counsel for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

18

QUESTIONS PRESENTED

1. Whether there are special and important reasons warranting review of this case by the Supreme Court of the United States.

2. Whether the Fifth Circuit Court of Appeals rendered a decision in conflict with any other circuit or departed from established law in affirming the judgment of the trial court.

PARTIES TO THE PROCEEDINGS

The parties in the courts below were:

Plaintiffs:	Jeffrey G. Russ and his wife Shannon C. Russ
Defendant:	International Paper Company

Plaintiffs lost in the trial court when summary judgment was rendered in favor of Defendant. Plaintiffs filed a motion for the trial court to reconsider its ruling on the summary judgment. The judge dismissed the motion. Plaintiffs appealed to the Fifth Circuit Court of Appeals. The judgment of the district court was affirmed. The Fifth Circuit Court of Appeals refused to rehear the case or have a rehearing en banc. Plaintiffs filed their petition for Writ of Certiorari on February 6, 1992.

TABLE OF CONTENTS

Page

Table of Authorities iv

Statement of the case 1

Argument

1. There are no special or important reasons warranting review of this case by the Supreme Court of the United States 6

2. The Fifth Circuit Court of Appeals did not render a decision in conflict with any other circuit or depart from established law in affirming the judgment of the trial court 8

TABLE OF AUTHORITIES

Page

JUDICIAL OPINIONS

Bach v. American Telephone & Telegraph, 840 F.2d 383 (5th Cir. 1988) 8

Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 2552, 91 L.Ed. 2d 265 (1986) 6, 7, 9

Erie Railroad v. Tompkins, 304 U.S. 64, 585 S. Ct. 817, 82 L.Ed. 1188 (1938) 6

Hanna v. Plumer, 380 U.S. 460, 85 S.Ct. 1136, 14 L.Ed. 2d 8 (1965) 6

Howell Hydrocarbons, Inc. v. Adams, 897 F. 2d 183, 191 (5th Cir. 1990) 10

John Deere Company v. American National Bank, Stafford, 809 F. 2d 1190 (5th Cir. 1987) 9

Mississippi Chemical Corporation v. Rogers, 368 So. 2d 228, 22 (Miss.1979) 7

O'Neill v. Airline Pilots Association, 886 F.2d 1428 (5th Cir 1989) 8

Randolph v. Laeisz, 896 F. 2d 964, 969 (5th Cir. 1990) 8

FEDERAL RULES OF CIVIL PROCEDURE

Rule 56 ..... 2, 3, 7, 10

STATEMENT OF THE CASE

On April 8, 1989, Jeffrey Russ ("Russ") was working as an electricians helper for BM Electric, Inc. ("BM"). BM had independently contracted with International Paper Company ("IP") to perform work at the IP facility in Natchez, Mississippi.

Russ was working in the course and scope of his employment with BM while installing "flex pipe" in a electrical cabinet. His wife sued IP for loss of consortium.[1] He was injured by the electricity as he was working and sued IP for fifteen million dollars alleging IP's negligence caused his injury. Discovery ensued and experts were designated. Plaintiff never came up with a theory to establish any negligence on the part of IP which caused or contributed to cause his injuries other than to say the area was unsafe due to poor maintenance. IP filed a motion for summary judgment alleging it was not and could not be liable for Plaintiff's injuries. The motion was supported by, among other things, the pleadings and discovery on file, IP's uncontested material facts, the plaintiff's own deposition and the contract between BM and IP.

IP contended there was no liability in the first place because BM controlled the area and nature of the work being performed. Assuming the court found an issue of material fact in regard to control, IP asserted it was not negligent because it warned plaintiff of the danger of the

---

[1] Since loss of consortium is a derivative claim, plaintiffs will be referred to in the singular for the sole purpose of clarity in this response.

electricity and plaintiff was well aware of the danger when working around the area. The motion referenced the exhibits and testimony upon which it was based.

Plaintiff responded to the motion by filing a memorandum in support of his response and an affidavit from purported expert John T. Butters, P.E. on the warning issue. In response to the motion, plaintiff's counsel stated "An expert hired by plaintiff surmises that Russ was burned by an electrical discharge which resulted from surface contamination by conducted accumulation of airborne industrial fly or waste."

The presiding senior United States District Court Judge, Hon. William H. Barbour, considered IP's motion and the documents, exhibits and affidavits submitted pursuant to F.R.C.P. 56(e). The Court found there was an issue of material fact regarding whether BM or IP had control of the particular work area where the accident happened. Contrary to the many incorrect assertions in plaintiff's brief about the trial court holding, the trial court did not agree with all the defenses to the original motion for summary judgment. The Court found, although there was an issue with regard to control, there was no issue in regard to at least one essential element of plaintiff's case. The Court found, as was asserted by IP, there was no material issue of fact in regard to whether the accident was caused by the negligence of IP because plaintiff, by his own admission, was warned of the danger of and was aware of it. The court specifically considered the affidavit of John T. Butters which was propounded by plaintiff to attempt to create a material issue of fact as to whether IP had breached its duty to plaintiff under the circumstances.

The Senior District Court Judge found the affidavit failed to meet the requirements of Rule 56(e) and specifically found it created no issue of material fact on the issue of whether IP had breached its duty of care owed to plaintiff. Summary judgment was rendered in favor of IP on March 8, 1990.[2]

Following the rendering of judgment, plaintiff filed a motion to reconsider the previous ruling. On May 23, 1990, Judge Barbour dismissed the motion to reconsider on the basis it was improper and nothing more than one more attempt to sway the judge by an unhappy litigant who had every opportunity to argue his points before judgment was entered.[3]

Still feeling aggrieved, plaintiff appealed to the United States Court of Appeals for the Fifth Circuit alleging virtually the same arguments he has in his Petition for Writ of Certiorari (i.e. he was not given adequate notice of the basis of the Motion and the Court improperly relied on IP's reply memorandum in granting the Motion for Summary Judgment.)

The Fifth Circuit Court of Appeals granted oral argument and gave plaintiff his day in court again. The parties briefed the issues and argued the case before the appellate court. The panel of the Fifth Circuit Court of appeals affirmed the summary judgment rendered in favor of IP. The Court specifically found IP pointed to issues it contended were established in the record and once it had done so it was incumbent upon plaintiff to go

---

[2] Appendix "A" to petitioners' brief.

[3] The Order is Appendix "B" to petitioners' brief.

outside the pleadings and designate specific facts showing there was a genuine issue for trial. The Appeals Court specifically agreed with the trial judge and found the affidavit submitted by plaintiff's expert was insufficient to create a material issue in regard to whether the warning given by IP was dispositive under the circumstances. Plaintiff has constantly claimed he was not given notice to respond to the motion filed by IP. Plaintiff submitted the affidavit of Butters to get around the warning issue and the Fifth Circuit Court of Appeals said the affidavit was insufficient and the issue of warning was "patently dispositive" in favor of IP.

The appellate court also found the trial judge properly denied the motion to reconsider because everything submitted by plaintiff in the motion to reconsider was available to him when he responded to the motion for summary judgment. Plaintiff even made no claim the material was unavailable when the response was filed. The decision of the panel was two to one.[4]

Judge Roney dissented in the Court of Appeals and stated he would vacate the decision and remand the case for the district court to apply the summary judgment principles set forth in the opinion of the Court. Judge Roney never even went so far as to say there were issues for trial. Plaintiff bases nearly his entire argument in his Petition for Writ of Certiorari on Judge Roney's dissent. It is significant Judge Roney did not feel strongly enough about his position to have the court reconsider its opinion or have a rehearing en banc. He did not vote for either one. On November 13, 1991 the United States Court of

---

[4] The Fifth Circuit Court of Appeals decision is Appendix "C" to petitioners' brief.

Appeals for the Fifth Circuit denied plaintiff's petition for rehearing and suggestion for rehearing en banc because no member of the panel nor Judge in regular active service on the Court even requested the Court be polled on rehearing en banc. Had Judge Roney felt as strongly about his dissent as plaintiff would have this Court believe he surely would have at least requested the Fifth Circuit Court of Appeals be polled on rehearing en banc.[5]

Still feeling aggrieved, now arguing and briefing this matter for what is now the fifth time, plaintiff has petitioned for a Writ of Certiorari alleging he was wronged because the district court granted summary judgment, refused his motion to reconsider, was affirmed by the Court of Appeals and the Court of Appeals refused his petition for rehearing and no member of the Court of Appeals requested rehearing en banc as he suggested.

Plaintiff's arguments are without merit and he has shown no issue which is special or important enough for this Honorable Court to exercise its discretion and give him an opportunity to argue his case for what would be the sixth time if this court grants his petition. Furthermore, the decision of the courts below is not contrary to any law or such a departure from established law as would necessitate this Court's exercise of its supervisory powers. The appellate court followed the law of summary judgment as propounded by this Court and properly affirmed the trial court decision.

---

[5] The Order denying the Petition for Rehearing and the Suggestion for Rehearing En Banc is Appendix "D" to petitioners' brief.

ARGUMENT

I.

THERE ARE NO SPECIAL AND IMPORTANT REASONS WARRANTING REVIEW OF THIS CASE.

This is a diversity case and the dispositive substantive issues depend on state law. *Erie Railroad v. Tompkins*, 304 U.S. 64, 585 S. Ct. 817, 82 L.Ed. 1188 (1938). The procedural aspects of this and all other diversity cases is controlled by federal law. *Hanna v. Plumer*, 380 U.S. 460, 85 S. Ct. 1136, 14 L.Ed. 2d 8 (1965). Summary judgment is only appropriate in federal court when the court has reviewed the record and determined there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 2552, 91 L.Ed. 2d 265 (1986).

The trial court reviewed the record and granted summary judgment in favor of IP based on one of the asserted grounds in the motion. The trial court rejected the first ground which was the plaintiffs employer had control of the premises and, therefore, IP could not be liable pursuant to state law. The court specifically found there were issues of fact which precluded summary judgment on that issue. Plaintiff quotes the trial court out of context and attempts to lead this Court to believe control was the only ground upon which the motion was based. Nothing could be further from the truth.

The second ground asserted by IP in its motion was it could not be liable to plaintiff because, by his own admission, he had been warned of the danger in the area and high voltage in the cabinet where he was working. Pursuant to state law, IP could not be liable when plaintiff (or

even his employer) was warned of electricity and the dangers of working around it. See *Mississippi Chemical Corporation v. Rogers,* 368 So. 2d 228, 222 (Miss.1979) (premises owner not liable if independent contractor and/or its employee is warned of the danger.)

The trial court granted IP's motion based on the second ground asserted. The court said it is undisputed both that BM was aware of the high voltage present in the cabinet and that plaintiff was warned of the danger. The only evidence the plaintiff produced to avoid liability on the warning issue was the affidavit of John T. Butters, a purported expert. The trial court found the affidavit totally failed to rebut the issue of whether the warning was dispositive. The court further found the affidavit even failed to meet the requirements of Federal Rule of Civil Procedure 56(e) and his "opinion" was totally baseless and useless.

Contrary to what plaintiff would have this Court believe, he knew exactly what issues were before him when the summary judgment was filed. He failed to produce competent evidence to even create a material issue of fact. The Court of Appeals applied the standard for summary judgment set forth in *Celotex* supra and affirmed the decision of the trial court. The Court of Appeals refused to rehear the case or rehear it en banc.

There are no special or important reasons warranting review of this case. The Petition for Writ of Certiorari should be denied.

II.

THE FIFTH CIRCUIT COURT OF APPEALS DID NOT RENDER A DECISION IN CONFLICT WITH ANY OTHER CIRCUIT OR DEPART FROM ESTABLISHED LAW IN AFFIRMING THE JUDGMENT OF THE TRIAL COURT.

The Fifth Circuit Court of Appeals, when hearing the appeal of a summary judgment, reviews the decision of the trial court de novo. See e.g. *O'Neill v. Airline Pilots Association*, 886 F.2d 1428 (5th Cir 1989); *Bach v. American Telephone & Telegraph*, 840 F.2d 383 (5th Cir. 1988). The appellate court applied the law of summary judgment set forth by this Court in cases such as *Celotex* supra. The Appeals Court drew all reasonable inferences in favor of the non moving party as it was required to do. *Randolph v. Laeisz*, 896 F2d 964, 969 (5th Cir 1990).

The Appeals Court found IP did not violate its duty to provide plaintiff a reasonably safe place to work because both plaintiff and his employer had been warned of the danger of the high voltage electricity. Plaintiff never questioned the construction of state law by the trial court or appellate court. He simply said he was not given adequate notice of the basis of the motion.

Contrary to the assertions by plaintiff, the trial court did not grant the motion sua sponte on grounds not advanced by IP. Plaintiff does not argue the standard for summary judgment applied by the Appeals Court is incorrect because the opinion clearly tracks the law and placed the proper burden on each of the respective litigants. The plaintiff cannot seriously contend the Appeals Court misinterpreted the law or was incorrect in holding

the affidavit produced in opposition to the motion was insufficient. Plaintiff, in order to cover up and to shift the focus from the inadequacy of the proof he put forth, attempts, again and again, to say the trial court was wrong and granted summary judgment on a ground not put forth by IP. That simply is not true. The trial court granted the summary judgment because plaintiff failed to put forth any competent evidence to rebut the "dispositive warning" which was the second basis of the motion. The Appeals Court also found the warning was dispositive and plaintiff's evidence was inadequate to rebut it.[6]

Plaintiff completely misconstrues the trial court and appellate decisions by citing cases like *John Deere Company v. American National Bank, Stafford*, 809 F.2d 1190 (5th Cir. 1987) which holds the court may not grant a summary judgment sua sponte. One need merely read the Appeals Court decision to see plaintiff's argument is completely unfounded.

Celotex makes clear the relative burdens of the parties:

> Of course, a party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which it believes demonstrate the absence of a genuine issue of material fact.

Celotex, 477 U.S. at 323, 106 S.Ct. at 2553. As stated by the Fifth Circuit Court of Appeals in this case:

---

[6] See Appendix "C" to petitioners' brief.

> Defendant had the "burden of informing the court of the basis for its motion and identifying the pleadings and other record evidence which it believe[d] demonstrate[d] the absence of a genuine issue of material fact." *Howell Hydrocarbons, Inc. v. Adams*, 897 F.2d 183, 191 (5th Cir. 1990). I.P. pointed to two issues it contended were established in the record, either of which would be considered dispositive under Mississippi law – B.M.'s control of the electrical cabinet where Russ was working and the warning I.P. gave B.M. "Once that [was] done, it [was] incumbent upon the non-moving part[ies] to go beyond the pleadings and by affidavits of [their] own, or by the 'depositions answers to interrogatories, and admissions on file', designate 'specific facts showing that there is a genuine issue for trial.' " Id. (quoting *Celotex*, 477 U.S. at 324, 106 S.Ct. at 2553). It was the plaintiffs' effort to go beyond the pleadings which the district court found insufficient.

In order to try and avoid summary judgment, the plaintiff responded to the motion by attaching the Butters affidavit previously mentioned. Both the trial court and the Appeals Court found the affidavit totally insufficient to rebut the "dispositive warning" given by the IP. Of course, both courts applied the standard set forth in Federal Rule Civil Procedure 56(e) when holding the affidavit insufficient as a matter of law. The summary judgment was granted and affirmed because plaintiff failed to provide any valid Rule 56(e) evidence of his new "alternative theory". Had the plaintiff designated *any* specific facts in his response to support his theory and create a material issue for trial, then summary judgment

would not have been granted because plaintiff may have been able to show the warning was not dispositive.

Plaintiff's counsel spends considerable time in his brief to this Court trying to show plaintiff did not know what caused his injury. However, what plaintiff fails to do is show how the testimony which he has cited out of context helps his new alternative theory to get around the fact he was warned of the electricity and knew to stay away from it. In his deposition, plaintiff/appellant Russ stated:

> Question: Were you in Butch's crew or did ya'll have definite crews and that kind of thing?
>
> Answer: Apparently so, because there was more than just one foreman. Butch is about the only one I ever seen really come around when I worked with Jeff.
>
> Question: So Butch was more or less your foreman?
>
> Answer: Yes.[7]

The plaintiff/appellant further stated:

> Question: How long had y'all been working in that electric center at the time of the accident?
>
> Answer: Probably a couple of days; or a day or so. This happened on a Saturday. That would have been time and a half work, so we started on it the day prior to that, that I know of. I can't remember if we started on it Thursday or either that Friday morning.[8]

---

[7] (Appellees' record, excerpts page 00086)

[8] (Appellees' record excerpt page 000090).

Plaintiff/appellant then continued to state:

> Question: Did anybody tell you anything about that box where you were working?
>
> Answer: Yes, Butch.
>
> Question: What did Butch tell you?
>
> Answer: He told me it was 4160 in the box, you know; be careful and stay clear of it. He said if it gets on you, it's gonna kill you. He made it plain and to the point to stay away from it.
>
> Question: Did he ever point to where it was?
>
> Answer: Yeah, he was back there and he showed us; that at the top is hot, this at the bottom is not. You could see the fuses pulled back and it was obvious what was hot and what wasn't.
>
> Question: So he showed you where that hot fuse clip was. . . .
>
> Answer: Oh, yeah.
>
> Question: . . . on the top?
>
> Answer: Yes.[9]

There is no way plaintiff can dispute the warning was dispositive pursuant to Mississippi law. His effort to get around the warning issue failed. There certainly has been no shifting of the burdens of production and proof as plaintiff would lead this court to believe. IP specifically pointed to record evidence showing there was no material issue for trial. Plaintiff failed to properly rebut

---

[9] (Appellees' record excerpts, page 000092.)

the evidence or even come forward with one shred of credible evidence for the trial court to consider. Summary judgment was properly affirmed by the Appeals Court. Furthermore, it was proper for the Appeals Court to refuse to rehear this case because the law is settled and was properly applied to the facts by the Appeals Court reviewing the trial court decision de novo.

CONCLUSION

The Fifth Circuit Court of Appeals properly affirmed the decision of the trial court in this case. Petitioners have shown no special or important issue which would warrant review of the trial and appellate court decisions in this case. The Appeals Court did not render a decision in conflict with any other circuit or depart from well established law in affirming the trial court. The Petition for Writ of Certiorari should be denied.

DATED: March 27, 1992.

Respectfully submitted,

RICHARD D. UNDERWOOD
VARNER, PARKER, SESSUMS, & AKIN
1110 Jackson Street
P.O. Box 1237
Vicksburg, MS 39180
(601) 638-8741

R.E. PARKER, JR.
VARNER, PARKER SESSUMS & AKIN
1110 Jackson Street
P.O. Box 1237
Vicksburg, MS 39180
(601) 638-8741

Lead Counsel for Respondent
International Paper Company